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BAKTI DINAMIK SDN BHD v. BAUER (MALAYSIA) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[ORIGINATING SUMMONS NO: 24NCC-345-09-2015]
30 JUNE 2016

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CIVIL PROCEDURE: *Injunction – Injunction to restrain presentation of winding up petition – Fortuna injunction – Petition based on claim for unpaid debt – Whether parties to action privy to contract – Whether notice of petition sustainable in absence of contractual relationship – Whether grant of Fortuna injunction justified – Companies Act 1965, s. 218*

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CONTRACT: *Privity – Building contract – Presentation of winding up petition by sub-contractor against employer of main contractor – Petition based on claim for unpaid debt – Whether employer privy to contract between sub-contractor and main contractor – Whether notice of petition sustainable in absence of contractual relationship – Whether grant of Fortuna injunction justified*

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CONTRACT: *Damages – Liquidated ascertained damages – Claim by employer of main contractor against sub-contractor – Employer not privy to contract between sub-contractor and main contractor – Whether employer entitled to liquidated ascertained damages from sub-contractor*

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The plaintiff, as the employer, owner and developer of a project, employed Hundred Vision Construction Sdn Bhd ('HVC') as the main contractor and HVC in turn engaged the defendant as a subcontractor for earthworks, which included reinforced concrete drain diversions, piling and basement substructure works. During the course of the construction works, specifically the piling activities carried out by the defendant, one of the buildings, adjacent to the project site suffered damage resulting in a suit to restrain the construction works and claim for damages. As a result, there was delay in the completion of the works by the defendant. The architect who administered the project issued a certificate of non-completion to the main contractor to certify the delay and the imposition of liquidated ascertained damages ('LAD'). However, there was no certificate of non-completion issued to the defendant. In fact, a certificate of practical completion was issued by the architect to HVC in relation to the scope of work of the defendant. Subsequently, the defendant issued a notice pursuant to s. 218 of the Companies Act 1965 ('Companies Act') claiming for payment from the plaintiff allegedly to be due under the interim certificates no. 15, 16 and 17. The plaintiff responded by saying that the s. 218 notice was issued in bad faith and that there was no debt due from the plaintiff to the defendant under the interim certificates. Hence, the plaintiff filed an application for a *Fortuna* injunction to restrain the defendant from presenting a winding up petition under s. 218 of the Companies Act. The thrust of the arguments advanced by the plaintiff were, *inter alia*, (i) there was no privity of contract between

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the plaintiff and the defendant to justify the latter issuing a notice under s. 218 of the Companies Act; and (ii) the plaintiff had a cross-claim against the defendant in that the amount claimed in the s. 218 notice was premised on the non-payment of the interim certificates no. 15, 16 and 17 directed against HVC being the main contractor of the project, not the plaintiff and which was subjected to deductions in favour of the plaintiff for LAD imposed by the architect and other defective works carried out by the defendant.

Held (allowing encl. 7 with costs):

(1) Whilst the defendant's claim as the sub-contractor in respect of work done was premised on the interim certificates no. 15, 16 and 17 and the certificate of practical completion, these were issued by the architect to HVC as the main contractor in respect of the contract between the plaintiff and HVC. The plaintiff was not privy to the letter of award of contract between the defendant and HVC. The plaintiff, as the employer, in making payment pursuant to the letter of award on any interim certificates to the defendant, was purely performing an act on behalf of HVC. (paras 22 & 24)

(2) In as much as the plaintiff was not privy to the letter of award, the defendant was also not a party to the interim certificates or the letters accompanying them. The letters accompanying the certificates from the architect were addressed and directed to HVC. Further, cl. 24(1)(c) of the Agreement and Conditions of PAM Sub-Contract 2006 provides that the defendant's recourse was only against HVC, not the plaintiff. Accordingly, in the absence of a contractual relationship between the plaintiff and the defendant, the claim of unpaid debt made by the latter was thus unsustainable. (paras 25-27)

(3) The defendant's argument that a debt may come into existence independently of or in the absence of a contractual basis was an unwarranted attempt to create an exception to the doctrine of privity of contract. There was no quasi-contract or that, in any event, payment should be made by the plaintiff to the defendant in order to prevent any form of unjust enrichment to the plaintiff. Hence, in the absence of a contractual relationship between the plaintiff and the defendant, the s. 218 notice issued by the defendant was not sustainable under the law. Allowing a winding-up petition to be presented on its basis would be an abuse of the court process and the petition, if presented, was bound to fail. Therefore, the granting of a *Fortuna* injunction was justified. (paras 29, 34 & 35)

(4) The interim certificates and the accompanying letters concerned the relationship between the plaintiff and HVC. Thus, the right of the plaintiff to impose LAD was exercisable against HVC, the main contractor, and not against the defendant, the sub-contractor. Further,

pursuant to the letter of award, the right to impose LAD on the defendant was exercisable by HVC and not the plaintiff who had no nexus with the defendant. Hence, the position taken by the plaintiff that the sums certified under the interim certificates were subject to deductions of LAD could be characterised as one which violated the principle against 'approbating and reprobating'. (paras 41 & 43)

(5) Even though in substance it could be said that a debt from HVC was in reality owing from the plaintiff as the employer, the s. 218 notice could not be enforced against the plaintiff. However, the defendant could well suffer LAD deduction should the plaintiff initiate the requisite process against HVC and HVC in turn making a demand for payment or LAD deductions against the defendant under the sub-contract. Hence, the plaintiff's case on cross-claim was not flawed despite the absence of contractual relationship. (paras 44-46)

(6) There was sufficient evidence to support the contention that the plaintiff was reasonably entitled, apart from the LAD for late completion, to seek recovery from the defendant as its sub-contractor in respect of civil claims arising from the damage by construction works done to the neighbouring properties. Further, the fact that there was no judgment debt rendered the debt claimed by the defendant under the s. 218 notice being disputed and there was thus stronger basis to consider the cross-claim. The plaintiff had also shown that the plaintiff and the project would suffer irreparable harm if the injunction was not granted. Further, the financial solvency of the plaintiff did not appear to be an issue and in any event, was not challenged by the defendant. (paras 54, 59-61)

(7) Criminal solvency, whilst clearly a critical issue to be determined by the courts when assessing whether or not a winding up order ought to be granted on the basis of a notice issued under s. 218(1)(e) of the Companies Act, should also be a consideration at the injunction application stage, but cannot without more defeat the position of an undisputed debt, especially a judgment debt. As a general rule, a debtor cannot legitimately hide behind the shield of solvency to stave off threat of winding up but at the same time, conveniently refuse settlement of an undisputed debt. (paras 63 & 64)

(8) In any event, the defendant was able to pursue a more efficient dispute resolution mechanism, by making an adjudication claim pursuant to the Construction and Industry Payment and Adjudication Act 2012. This could be a more suitable alternative procedure for the defendant to assert its claim, instead of inflicting upon the plaintiff undue pressure *via* a winding up notice through the medium of the winding up court that could occasion irreparable damage to an otherwise commercially solvent company. At its core, there was no judgment debt in the instant

case. In the circumstances, the plaintiff had successfully established its case for the grant of a *Fortuna* injunction to restrain the presentation of a winding up petition by the defendant against the plaintiff. (paras 66 & 70)

Case(s) referred to:

Best Re (L) Ltd v. Hanwha General Insurance Co Ltd [2014] 9 MLJ 125 ***(refd)***
Dataran Rentas Sdn Bhd v. BMC Constructions Sdn Bhd [2007] 6 CLJ 613 CA ***(dist)***
Dawnays Ltd v. FG Minter Ltd And Another [1971] 2 All ER 1390 ***(refd)***
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 ***(dist)***
Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 ***(refd)***
Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd [2009] 1 LNS 1430 HC ***(dist)***
Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd [2013] 9 CLJ 650 HC ***(refd)***
Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***
Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***
Re Lympne Investments Ltd [1972] 2 All ER 385 ***(refd)***
Re Prime Link Removals Ltd [1987] 1 NZLR 510 ***(refd)***
RHB Bank Bhd v. Gunasingam Ramasingan [2002] 5 CLJ 544 HC ***(refd)***
Seawealth Nautical Sdn Bhd v. Kekal Kaya Marin Sdn Bhd [2011] 9 CLJ 577 HC ***(refd)***
Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***
Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd [2007] 6 CLJ 570 CA ***(refd)***
Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew Hon & Ors (Interveners) [1993] 1 CLJ 555 HC ***(refd)***
Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd [2010] 2 CLJ 541 CA ***(refd)***
Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd [2011] 9 CLJ 705 CA ***(dist)***

Legislation referred to:

Companies Act 1965, s. 218
Specific Relief Act 1950, ss. 50, 51

For the plaintiff - Chetan Jethwani; M/s Mohanadass Partnership
For the defendant - Sanjay Mohan & Adam Lee; M/s Kumar Partnership

Reported by S Barathi

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an application for a *Fortuna* injunction filed by the plaintiff to restrain the defendant from presenting a winding up petition under s. 218 of the Companies Act 1965 against the plaintiff.

A **Key Background Facts**

[2] The plaintiff is the employer, owner and developer of a project known as the Residensi Tribeca which consists of a 37 storey block of service apartments at Jalan Imbi in Kuala Lumpur ('the project').

B **[3]** The plaintiff appointed HVC Hundred Vision Construction Sdn Bhd ('HVC') as the main contractor for the project. The main contractor was a turnkey contractor for the entire project covering all the construction works. HVC in turn engaged the defendant as a subcontractor for earthworks, which included reinforced concrete drain diversions, piling and basement substructure works.

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[4] The project is being administered by Veritas Architects Sdn Bhd ('the architect') and Dr CC Wong Jurutera Perunding as the consultant engineer. The valuation of works on the site is carried out by Perunding Kos T&K Sdn Bhd ('the quantity surveyor').

D **[5]** During the course of the construction works, specifically the piling activities carried out by the defendant, one of the buildings adjacent to the project site, owned by Wagner Piano Sdn Bhd ('Wagner Piano') was claimed to have suffered damage, resulting in the latter instituting a suit to restrain the construction works and claim damages.

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[6] There was a delay to the completion of the works by the defendant with the architect issuing a certificate of non completion to the main contractor to certify the delay and the imposition of Liquidated Ascertained Damages ('LAD'). No Certificate of Non Completion was issued to the defendant. In fact, a Certificate of Practical Completion was issued on
F 13 March 2015 by the Architect to HVC in relation to the scope of work of the defendant.

[7] The defendant, however, on 29 June 2015 issued a notice pursuant to s. 218 of the Companies Act 1965 ('the s. 218 notice') claiming payment of the sum of RM3,976,313.38 from the plaintiff said to be due under Interim
G Certificates No. 15, 16 and 17.

[8] The plaintiff then issued a response on 16 July 2015 stating that the s. 218 notice was issued in bad faith and that there was no debt due from the plaintiff to the defendant under the interim certificates, highlighting in
H particular that:

(i) The interim certificates on which the s. 218 notice was based were qualified and subject to deductions for LAD in the amount of RM1,230,000;

(ii) There were damages for defective works in the amount of RM100,000;
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(iii) The sum was subject to deductions resulting in damage to neighbouring properties as result of poor workmanship including the damage to Wagner Piano where a liability of RM3,825,224.40 has arisen;

(iv) The plaintiff was entitled to set off a sum of RM1,558,961.12 with respect to the works done by the defendant.

[9] The plaintiff then filed these proceedings for a declaration that the s. 218 notice was void and of no effect and for an injunctive relief pending the hearing of the plaintiff's originating summons.

Summary Of Contentions By Parties

[10] The thrust of the arguments advanced by the plaintiff to support its application for a *Fortuna* injunction are twofold. The first is that there is no privity of contract between the plaintiff and the defendant to justify the latter issuing a notice of winding up under s. 218 of the Companies Act 1965 ('the CA') dated 29 June 2015 ('the s. 218 notice') in the first place. Secondly, the plaintiff has a cross-claim against the defendant in that the amount being claimed in the s. 218 notice is premised on the non-payment of the interim certificates number 15, 16 and 17 directed against HVC, being the main contractor for the project, not the plaintiff, and which is subject to deductions in favour of the plaintiff for LAD imposed by the architect and other defective works carried out by the defendant.

[11] The defendant on the other hand resisted the application and contended that its claim for RM3,976,313.38 was valid for it was the total certified sums which are still outstanding for work done by the defendant. The certificate of practical completion had been issued by the architect to HVC, the main contractor in respect of the subcontract works of the defendant, pursuant to which the works under the responsibility of the defendant were practically completed on 28 February 2015. Although the defendant did issue a total of three applications for extension of time given the various delays faced by the project during the progress of the works, including concerning the alleged defect to the property of Wagner Piano, these were however not assessed by HVC. In fact, HVC did not also at any time issue any certificate of non-completion ('CNC') against the defendant.

[12] Instead, the architect issued four CNCs against HVC on 19 November 2014, 6 February 2015, 4 March 2015 and 20 April 2015. The defendant thus contended that not having been issued with any CNC, no liquidated damages could be imposed on the defendant, relying also on cls. 16.1 and 26.13 of the sub-contract. It is thus entitled to the payment of RM3,976,313.38 as set out in the s. 218 notice for neither the plaintiff, whom the defendant asserted had the obligation to make direct payment to the defendant under the terms of the letter of award, nor HVC had paid the defendant for work done prior to the issuance of the CPC.

[13] The defendant further argued that the plaintiff's claims in respect of firstly, the LAD for RM1,230,000 and secondly the damage to the property of Wagner Piano are of no relevance to the defendant for these are matters to be resolved between the plaintiff and HVC as the main contractor, since the CNCs were all issued against HVC and not the defendant. There is

additionally no right of set-off against the sums certified in the interim certificates for the same reason that there was not a single CNC issued against the defendant. The defendant relies on the Court of Appeal decision in *Dataran Rentas Sdn Bhd v. BMC Constructions Sdn Bhd* [2007] 6 CLJ 613; [2008] 2 MLJ 856 which held that the question whether a building contract admits of a right of set-off is one that turns upon the true construction of the contract which may have the effect of modifying the common law and equitable rights of set off of the contracting parties. The defendant again referred to cls. 16.1 and 26.13 of the sub-contract to the effect that in the instant case, there is no right of set-off that can be exercised by the plaintiff.

[14] It is also the submission of the defendant that the plaintiff now blaming the defendant to be responsible for the damage to the property of Wagner Piano when the former did not during the material period prior to the issuance of the s. 218 notice allege to the same effect is thus clearly an afterthought. It was not raised in the defence of the plaintiff in the earlier suit instituted by Wagner Piano, nor throughout the course of the subcontract works right through the issuance of the CPC. The matter only surfaced in May 2015, when HVC sought to call on the performance bond against the defendant, in respect of which the defendant successfully secured an injunction granted by the High Court on 25 September 2015. Even the letter relied on by the plaintiff, as issued by the architect dated 23 September 2015 alleging cracks on the property of Wagner Piano attributed to the sub-contract work of the defendant is later in time to the s. 218 notice dated 29 June 2015. Thus, the position taken by the plaintiff is argued by the defendant to be an afterthought calculated to stifle a genuine statutory right of the defendant to present a winding up petition as similarly decided in the case of *Best Re (L) Ltd v. Hanwha General Insurance Co Ltd* [2014] 9 MLJ 125, and further represented a violation of the principle that effectively treats interim certificates in construction works to the equivalent of cash, which is clearly essential for the defendant to maintain its cash-flow and allow for continuation of works.

[15] The defendant further asserted that the obligation on the part of the plaintiff to pay the defendant is not based on the existence of a contractual relationship but instead on the premise that there is indebtedness owing by the plaintiff to the defendant. Thus, the defendant submitted that a debt may arise not only by agreement and in the instant case the claim is based on the interim certificates which, by their nature, constitute a debt due by the plaintiff to the defendant.

[16] In essence, the defendant therefore argued that there is no *bona fide* disputed debt on substantial grounds nor any basis to allege an abuse of process on the part of the defendant who is merely exercising its statutory right to pursue a winding up process under the CA.

Evaluation And Findings By This Court

The Law

[17] The jurisprudential basis of the applicability of *Fortuna* injunctions in this country in part may be traced to the eponymous *Australian* case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83, a decision of the Supreme Court of Victoria. It established that an injunction would only be granted in circumstances where to allow the petition would be an abuse of process as the petition has no chance of success. And that the plaintiff would have to show that the petition, if presented, would likely be dismissed. To do this, the court would have to consider whether there is a *bona fide* dispute of debt based on substantial grounds. The same principles were adopted and applied by our Court of Appeal in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316, where Gopal Sri Ram JCA (as he then was) summarised the position in the following manner:

> (3) The kind injunction by which an intended winding up petition is sought to be restrained is known as "*Fortuna* injunction". The phrase takes its name from *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* where the juridical basis for the relief was first explained. Fortuna Holdings made it clear that the courts have established a principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. It was also clear that two distinct branches emanate from the principle - of which the first applies in cases where the presentation of the petition may produce irreparable damage to the company and where the proposed petition has no chance of success, and the second in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

[18] The Court of Appeal again had the occasion to consider the application of a *Fortuna* injunction, where in the case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, Ramly Ali JCA (as he then was) provided most instructively the following explanation:

> [25] An application for an injunction to restrain an intended winding-up petition against a company is known as a "*Fortuna* Injunction", taking its name from the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect. (see also: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeal).
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> [26] The first principle laid down in that case is that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the

proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie,:

(i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

(ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25).

[27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.

[28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

[29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[19] The Court of Appeal in *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305; [2007] 4 MLJ 355 further explained that the court exercises its inherent jurisdiction when issuing such an injunction to restrain the presentation of a winding up in order to prevent an abuse of process. The test when granting the injunction is whether there is *bona fide* dispute of the debt. Gopal Sri Ram JCA (as he then was) held:

[8] When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is *bona fide* disputed on substantial grounds (see *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 does not apply.

[20] Indeed, in addition to the court's inherent jurisdiction, it cannot be denied that in Malaysia, ss. 50 and 51 of the Specific Relief Act 1950 also confer on the courts the jurisdiction to grant such *Fortuna* injunctions, whether temporarily or permanently. The High Court in *RHB Bank Bhd v. Gunasingam Ramasingan* [2002] 5 CLJ 544 held thus:

> The power of the High Court to grant an injunction to restrain a petitioner from presenting a winding up petition is described by Stephenson LJ in *Bryanston Finance Ltd v. De Vires No 2* Ch 63 at 79C as a facet of its inherent jurisdiction to prevent an abuse of its process. Here in our jurisdiction that power is not merely inherent but provided in clear terms in s. 50 of the Specific Relief Act 1950.

[21] In light of the foregoing authorities and other relevant judicial pronouncements, it should now be considered settled law that the courts may grant a *Fortuna* injunction to prevent the presentation of a winding up petition on the basis of either the petition has no chance of success and might produce irreparable damage to the company, or that an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage. The courts must be satisfied that the plaintiff has established a *prima facie* case of an abuse of process by the presentation of a petition particularly on the basis of a disputed debt; and the serious question to be tried test established in *American Cynamid Co v. Ethican Ltd* is not applicable.

There Is No Debt From The Plaintiff As There Is No Contractual Relationship Between The Plaintiff And The Defendant

[22] On the evidence before me in this application, whilst the defendant's claim as the sub-contractor in respect of work done is premised on the interim certificates no. 15, 16 and 17 and the certificate of practical completion, these were issued by the architect to the main contractor (HVC) in respect of the contract between the plaintiff and the main contractor (the main contract). Although the contract between the defendant and HVC, being the letter of award from the latter to the former dated 26 August 2013 ('the letter of award') in cl. 7.5 expressly provides for the payment by the main contractor to the sub-contractor to be made by the plaintiff on behalf of the main contractor, in my view it is fundamental that the doctrine of privity of contract must be firmly upheld. Here, the plaintiff is not privy to the letter of award contract between the defendant and the main contractor, and even that cl. 7.5 states to the effect that it does not in any event give the defendant the contractual right against the plaintiff.

[23] For completeness I reproduce cl. 7.5 of the letter of award hereunder:

> Notwithstanding the conditions of the Sub-Contract, Bakti Dinamik Sdn Bhd (hereinafter referred to as the "Employer"), Hundred Vision Sdn Bhd (hereinafter referred to as the "Contractor") and Bauer Sdn Bhd (hereinafter referred to as the "Sub-Contractor") agree that all payments to be made by the Contractor to the Sub-Contractor in accordance with

A the Sub-Contract **shall instead be made directly by the Employer to the Sub-Contractor for and on behalf of the Contractor** within the Period of Honouring of Certificate of Payment. **All direct payments made under this provision shall not create a privity of contract between the Employer and the Sub-Contractor**. (emphasis added)

B **[24]** It is thus clear that the plaintiff, as the employer, in making payment pursuant to the letter of award on any interim certificates to the sub-contractor, being the defendant, is purely performing an act on behalf of the main contractor, HVC. In the first place, surely it can only arise if there is an obligation on the part of HVC to make payment to the defendant. But this is patently only secondary to the more pertinent and applicable point that even if HVC were contractually bound to effect such payments, the plaintiff's alleged failure to do so on behalf of HVC is of no legal or contractual consequence *vis-a-vis* the rights of the defendant. It is so trite that this must be the case in the absence of a contractual relationship between the plaintiff and the defendant. And nothing could be more crystal clearly worded than the aforesaid last sentence of cl. 7.5 which unmistakably states to such exact effect.

[25] The plaintiff's position on this point is further fortified by the fact that the very interim certificates the defendant relies on each contains the statement that the amount due in the respective certificates is owing from the plaintiff as the employer to HVC, the main contractor ('is now due to the contractor by the employer'). The defendant is thus a third party to these interim certificates too. Additionally, the letters accompanying each of the certificates from the Architect are clearly addressed and directed to HVC, *albeit* these letters seek to instruct HVC on what sums are due to be released to the defendant in respect of the sub-contracted works. But the defendant is not a party to the interim certificates or the letters accompanying them in as much as the plaintiff is not privy to the letter of award.

[26] Further, cl. 24.1(c) of the agreement and conditions of PAM Sub-Contract 2006 (For Use Where the Sub-Contractor is Nominated Under The PAM Contract 2006) which expressly permits the defendant to end his appointment in the event of non-payment by the main contractor clearly supports what is already plain and obvious that the defendant's recourse is only against the main contractor, not the plaintiff. Additionally, this cl. 24.1(c) specifically provides that such payment obligation by the main contractor in respect of any certificate is however subject to any set off the main contractor could be entitled to under the same contract with the defendant.

[27] In my judgment, accordingly, in the absence of a contractual relationship between the plaintiff and the defendant, the claim of unpaid debt made by the latter is thus unsustainable. The defendant cannot premise its s. 218 notice on a debt which is not due from the plaintiff. Even if a debt is established given non-payment of the said interim certificates, it would be

for HVC, the party which is seised of the contractual nexus with the defendant that must answer the claim. In order to vindicate its right for payment under the letter of award, the defendant's avenue is to first make a claim against HVC. Even if that is successfully established, still, it is not for the defendant to enforce the same against the plaintiff directly, for the same overarching reason of the plaintiff not being contractually privy to the relationship between the defendant and HVC.

[28] This court cannot countenance a departure from the well-entrenched rule in the law of contract that a third party can neither benefit nor suffer from a contract executed by other parties. A contract cannot be enforced against or by a third party (see the leading common law authority of *Tweddle v. Atkinson* [1861] 1 B & S 393 and the Privy Council decision in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170). The law thus treats the plaintiff as a stranger to the sub-contract, in as much as the defendant a third party to the main contract.

Whether A Debt Arises Independently Of A Contract

[29] The defendant's argument that a debt may come into existence independently of or in the absence of a contractual basis by relying on the House of Lords authority in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 is in my view, an unwarranted attempt to create an exception to the doctrine of privity of contract. The fundamental point decided by the House of Lords was the right to repayment of money prepaid under a contract which was discharged by impossibility of performance or frustration. In that case a polish company in accordance with a contract for purchase of machinery with an English company had made a certain payment to the latter before it would receive anything. Germany then invaded Poland, Britain declared war on Germany, and World War II broke out. British companies were as a result prohibited from trading with Poland.

[30] In its written submissions, the defendant referred to the following passages from the judgment of Lord Wright:

> Lord Mansfield prefaced this pronouncement by observations which are to be noted. "If the defendant be under an obligation from the ties of natural justice, to refund; the law implies a debt and gives this action [sc. *indebitatus assumpsit*] founded in the equity of the plaintiff's case, as it were, upon a contract ('*quasi ex contractu*' as the Roman law expresses it)." Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort.

A This statement of Lord Mansfield has been the basis of the modern law of *quasi*-contract, notwithstanding the criticisms which have been launched against it. Like all large generalisations, it has needed and received qualifications in practice. There is, for instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for moneys paid under an illegal or
B excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it.

The gist of the action is a debt or obligation implied, or, more accurately,
C imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost ... .

[31] In essence, the defendant is trying to make the argument that firstly, the right for payment in its favour arose from a "debt" owed by the plaintiff, which term was referred to by the case of *Watta Battery Industries Sdn Bhd*
D *v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew Hon & Ors (Interveners)* [1993] 1 CLJ 555; [1993] 1 MLJ 149 as denoting not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. Secondly, more significantly this alleged obligation on the part of the plaintiff to pay the debt is not founded on a contract, but created by law
E in the form of a *quasi*-contract. The defendant did not fully develop its argument on this point, but this appears to be the contention of the defendant.

[32] Such assertions by the defendant are untenable and without merit, as is its reliance on *Fibrosa Spolka* wholly misconceived and unjustified. That case is a leading authority on the subject of frustration of contract. In that
F case, the contract was frustrated since it was plainly no longer possible to perform the same because of the supervening illegality. The House of Lords decided that where a party receives no benefit from a contract, but has paid part of the consideration prior to frustration, then that party can recover the advance payment since there has been a total failure of consideration. It has
G little resemblance to the facts, nor relevance to the real and substantive issues before the court in the instant case. Frustration of contracts by definition involves the pre-existence of a contract which performance is subsequently frustrated. In the instant case, it is incontrovertible that there is no contract between the plaintiff and the defendant to start with. Neither is frustration
H of any relevance to the instant case.

[33] More crucially however, the passages in the judgment of Lord Wright cited by the defendant which were attributed to Lord Mansfield, when read in their entirety, clearly demonstrate that whilst recovery is based on a *quasi*-contractual right, this right is not premised on any implied promise to repay
I but instead on an obligation imposed by law with the overriding objective of preventing unjust enrichment. Thus in the process, the whole discussion on money had and received was similarly focused on dissecting circumstances such as payments made in error justifying the law demanding

a recipients of money to repay or return the same because it would be simply wrong for the person not to do so. The following parts of the judgment of Lord Wright (not highlighted by the defendant) make the point manifest:

> Must, then, the court stay its hand in what would otherwise appear to be an ordinary case for the repayment of money paid in advance on account of the purchase price under a contract for the sale of goods merely because the contract has become impossible of performance and the consideration has failed for that reason? The defendant has the plaintiff's money. There was no intention to enrich him in the events which happened. No doubt, when money is paid under a contract it can only be claimed back as for failure of consideration where the contract is terminated as to the future. Characteristic instances are where it is dissolved by frustration or impossibility or by the contract becoming abortive for any reason not involving fault on the part of the plaintiff where the consideration, if entire, has entirely failed, or where, if it is severable, it has entirely failed as to the severable residue, as in *Rugg v. Minett*. The claim for repayment is not based on the contract which is dissolved on the frustration but on the fact that the defendant has received the money and has on the events which have supervened no right to keep it?.

[34] It cannot therefore by any shred of imagination be argued that there is in this instant case before this court, a *quasi*-contract or that in any event, payment should be made by plaintiff to the defendant in order to prevent any form of an unjust benefit or enrichment to the plaintiff. To be clear, the defendant did not quite present its argument in this fashion, although its reliance on *Fibrosa Spolka*, despite not elaborating on it, suggests otherwise. In my view, at the risk of repetition, it is quite plain and thus beyond peradventure that *Fibrosa Spolka* cannot apply to the instant case because the latter does not involve a contract between the parties in dispute in this suit, there is no frustration, and significantly the issue of unjust enrichment does not arise at all.

[35] I am therefore satisfied that on the issue of the absence of a contractual relationship between the plaintiff and the defendant alone, given the clear absence of any debt owing by the plaintiff under the main contract to the defendant, the s. 218 notice issued by the defendant is not sustainable under the law, and thus allowing a winding up petition be presented on its basis would be an abuse of process. A petition, if presented on the s. 218 notice in the instant case would be bound to fail. This therefore more than justifies the granting of a *Fortuna* injunction to prevent the presentation of a winding up petition by the defendant against the plaintiff in relation to the said s. 218 Notice. Thus, it is not strictly necessary to consider the second basis relied on by the plaintiff to support its application for the *Fortuna* injunction. However, for completeness, and should I be adjudged to be wrong on the aforesaid first ground, I shall in any event still analyse the second ground proffered by the plaintiff.

A **The Plaintiff Has A Valid Cross-claim**

[36] It should be stated that the letter of award, as is standard, expressly provides its terms and those in the Agreement and Conditions of PAM Sub-Contract 2006 (For Use Where the Sub-Contractor is Nominated Under The PAM Contract 2006) ('PAM Sub-Contract') as forming an integral part of the sub-contract between the parties. The defendant, as stated above, also relied on the latter, specifically cls. 16.1 and 26.13, which read as follows:

> 16.1. If the Sub-Contractor fails to complete the Sub-Contract Works by the Sub-Contract Completion Date(s), the Contractor shall issue a Certificate of Non-Completion (with a copy to the Architect and Consultant) stating that is his opinion, the Sub-Contract Works (or any section of the Sub-Contract Works) ought reasonably so to have been completed. The Contractor shall then be entitled to set-off a sum for any loss and/or expense suffered or incurred by the Contractor, after taking into consideration the apportioning of liability where the delays may also be caused by the Contractor and other Nominated Sub-Contractors. As an alternative to loss and expense, the parties may agree to the amount of Liquidated Damages stated in Appendix 'A'. The loss and/or expense or any Liquidated Damages shall be set off by the Contractor under Clause 26.13.
>
> ...
>
> 26.13. The Contractor shall be entitled to set off the amount of all cost incurred and loss and expense where it is expressly provided under Clauses 7.4, 14.3, 16.1, 17.3(b), 17.3(c), 17.5, 17.6, 20.6, 26.17 and Appendix 'B'. No set off under this clause may be made unless:
>
> > 26.13(a) The Contractor has submitted to the Sub-Contractor complete details of their assessment of such set-off; and
> >
> > 26.13(b) The Contractor has given the Sub-Contractor a written notice delivered by hand or by registered post, specifying his intention to set off the amount and the grounds on which such set-off is made. Unless expressly stated elsewhere, such written notice shall be given not later than twenty eight (28) days before any set off is deducted from any payment by the Contractor.
>
> If the Sub-Contractor after receipt of the written notice from the Contractor, disputes the amount of set-off, the Sub-Contractor may within twenty one (21) days of receipt of such written notice, send to the Contractor by hand or by registered post a statement setting out the reasons and particulars for such disagreement. If the parties are unable to agree on the amount of set off within a further twenty (21) days after receipt of the Sub-Contractor's response, either party shall refer the dispute to adjudication under Clause 28.1. The Contractor shall not be entitled to exercise any set-off unless the amount has been agreed by the Sub-Contractor or the adjudicator has issued his decision.

[37] These clauses however do little to advance the case of the defendant, if at all, since they cannot offer an effective riposte to the fundamental issue of the absence of contractual nexus between the plaintiff and the defendant which thus resolves this instant case in favour of the plaintiff.

[38] But these clauses are, in my assessment, relevant when the second basis of contention proffered by the plaintiff to apply for a *Fortuna* injunction is analysed. As stated above, the plaintiff also contends that the debt alleged by the defendant is subject to cross claims and cannot be construed as being final. The plaintiff's case, apart from relying on the doctrine of privity of contract argument, is that the sums certified under the interim certificates are expressly stipulated to be subject to any deductions of LAD that may be imposed by the plaintiff. The material words appearing on these certificates are thus:

> Please note that the Employer reserves the right to deduct the total Liquidated Damages amounting to ...

[39] The letters from the architect accompanying the certificates as addressed to HVC too clearly provide for the right of the plaintiff to deduct any liquidated damages that may be imposed as a consequence of any delay in the completion of the works. This, as an example, was stated in interim certificate no. 15:

> Please note that the Employer reserves the right to deduct the total Liquidated Damages (L.D) amounting to RM1,500,000.00 upon the issuance of Certificate of Non-Completion on Section "A" No. 2 ref. 09-059(SA1)/hvsb/clcnc-002 dated 19 September 2014 in pursuant to Clause 22.0 on Damages for Non-Completion of PAM Contract 2006 (With Quantities).

[40] In addition, the plaintiff highlighted that the letter of award of the sub-contract also states as follows:

> 5.0. Liquidated Ascertained Damages
>
> The parties hereby agree that time is of the utmost essence to this Sub Contract and in the event you fail to complete the Works by the above date or within any extended period as may be granted by the Architect, Liquidated Damages shall be deducted for the Works which have remained and shall remain incomplete at the rate of RM30,000.00 per day.

[41] Whilst the intention is for the plaintiff, as the employer in the construction project, to have the right to make LAD deductions, in as much as for a contractor and a sub-contractor be paid for work completed, the defendant's contention in response is not unattractive for it is rooted in the now familiar basis of the absence of any contractual relationship between the plaintiff and the defendant. The interim certificates, and the letters that accompany each of them concern the relationship between the plaintiff and HVC. Thus the right of the plaintiff to impose LAD is exercisable against

HVC, the main contractor, and not against the defendant, the sub-contractor. Further, cl. 5.0 referred to above is part of the letter of award granted to the defendant which is plainly between the main contractor and the sub-contractor. It certainly speaks of the right to impose LAD on the defendant, but that right, under contract law, is exercisable by HVC, not the plaintiff who has no contractual nexus with the defendant.

[42] In this regard, it would not be surprising if the defendant were to charge that the plaintiffs' position may be construed as amounting to a contradiction. On the one hand, they argued that the lack of contractual relationship should bar the defendant from presenting a winding-up petition. On the other hand, the plaintiff is also at the same time asserting the existence of a cross-claim despite the fact that such claim is to be enforced against HVC, not the defendant who is not contractually privy to any contract with the plaintiff.

[43] The position taken by the plaintiff on this point may thus be characterised as one which violates the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as his Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[44] Upon deeper evaluation however, I find that the basis of the contention of the plaintiff is not without merit. Whilst both parties attack the case of the other on the same ground of the absence of any contractual relationship between the parties, the position of the defendant is unmistakably flawed in its totality since it is trying to claim a debt from a wrong party. Even though in substance it could be said that a debt from HVC was in reality owing from the plaintiff as the employer, as things stand, the s. 218 notice cannot at any rate be enforced against the plaintiff. On the other hand, the plaintiff is seeking to prevent the defendant from presenting a winding up petition by asserting the existence of a cross-claim. This cross-claim is however not against the defendant but against HVC. But this without more does not render the plaintiff's argument necessarily faulty.

[45] Whilst any action by the plaintiff against non-completion by the defendant would require the plaintiff to first claim against HVC, a successful claim would likely result in HVC in turn making a demand for payment or LAD deductions against the defendant under the sub-contract. In other words, assuming the claim for the non-completion by the defendant to be valid, the defendant could well suffer LAD deductions should the plaintiff initiate the requisite process against HVC first. The fact that the plaintiff has not yet commenced any such claims does not mean there would not be one in the future.

[46] It is in this sense that the case of the plaintiff on cross-claims is not flawed despite the absence of contractual relationship. In other words, whilst this same ground renders the position of the defendant untenable under the law (for failing the legal pre-requisite that there must be a debt owed by the debtor, which in this instant case, is not the correct party), the same effect does not afflict that of the plaintiff who is attempting to show the existence of a debt which is disputed on substantial grounds. And the question whether there is a valid cross-claim by the plaintiff which could, *albeit* indirectly, be ultimately enforced against the defendant despite the absence of contractual nexus cannot be summarily dismissed as it is an issue that remains to be established by evidence.

[47] The question then is whether the cross-claim by the plaintiff is sufficiently meritorious to render the alleged debt to be *bona fide* disputed on substantial grounds. To start with, I should add that the absence of a contractual nexus is a factor that weighs down the position of the plaintiff not inconsiderably. The defendant referred to the Court of Appeal decision in *Dataran Rentas Sdn Bhd v. BMC Constructions Sdn Bhd* [2007] 6 CLJ 613; [2008] 2 MLJ 856 which in turn cited the Federal Court decision in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345; [1995] 2 MLJ 57 and argued that these cases established that once interim certificates have been issued, payment must be made, without the setting off of any quantum or monies, or asserting any cross-claims. Thus in *Dataran Rentas*, Gopal Sri Ram JCA (as he then was) held the following:

> [3] In my judgment, on a true construction of cll. 26(1)(a) and 30(1) of the contract in the present case, the appellant's obligation to make payment on an interim certificate is a fundamental term or to put it slightly differently, a primary obligation. Since the appellant did not fulfil a primary obligation of the building contract, the respondent was entitled to treat the contract as at an end (see *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675).
>
> [5] The third point is this. Once the respondent had a debt due to it from the appellant that remained unsatisfied, it was entitled to present a winding up petition. All issues that go to challenge the debt may be dealt with at the hearing of the petition. As Wan Hamzah SCJ said in *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 (at pp. 448-449):
>
> > Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a *bona fide* dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[48] It is true that the importance of paying up on duly issued interim certificates to the construction industry cannot be emphasised enough. But in the final analysis what matters is the true construction of the document

governing the rights and obligation of the contracting parties in any given project. The defendant in the instant case also cited the English Court of Appeal decision in *Dawnays Ltd v. FG Minter Ltd And Another* [1971] 2 All ER 1390 and highlighted the following passage:

> The interim certificate is regarded as the equivalent of cash. The sub-contractor needs the money so as to get on with the rest of his work.
>
> On principle, and in practice, once a certificate is issued, it must be paid, **save for permitted deductions**.
>
> (emphasis added)

[49] It is thus clear that payment obligations are not necessarily absolute and automatic, for even in Dawnays it is recognised that certain deductions may be permitted. Indeed this right of set-off and cross-claims is also acknowledged in *Dataran Rentas*, where Gopal Sri Ram JCA stated:

> [4] The second issue is the appellant's alleged right to a set off. As a general rule, every contracting party has, in equity, a right to set off any sum - liquidated or unliquidated - that may be due from the other provided it arises out of the same or substantially the same transaction (see *Permodalan Plantations Sdn Bhd v. Rachuta Sdn Bhd* [1985] 1 MLJ 157; *Shanghai Hall Ltd v. Town House Hotel Ltd* [1967] 1 MLJ 223. But, like any other common law or equitable right it is capable of exclusion or modification by contract. And where this has happened, the former ceases to be exercisable (see *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57). *Thus, the question whether a building contract admits a right of set off is one that turns upon the true construction of the particular contract. In the present case, as pointed out by my learned brother, the common law and equitable rights of set off have been modified by the terms of the contract. The contractual conditions precedent to the exercise of the right to a set off were clearly absent here and as such the appellant could not on the facts assert the right*. (emphasis added)

[50] The position was further clarified by the Court of Appeal in the judgment of Zulkefli Ahmad Makinuddin JCA (now CJ (Malaya)) in that same case in the following manner:

> [9] We are of the view that based on cl. 26(1)(a) of the PAM Conditions, it gives the respondent the contractual right to determine the respondent's employment under the contract in the event of the failure of the appellant to pay within the time stipulated under cl. 30(1). On this point it is to be noted that in the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, the Federal Court held, *inter alia*, that by virtue of the express provisions of the contract allowing contractual right of set off, it was construed that the contract excludes the operation of common law rights of set off. **As such, the employer's right of set off against the sum due under the contract is restricted to those expressly allowed under the contract**.

> **In the present case the appellant have no permissible set off under the PAM contract against the certified sum**. There was no architect's instruction given under cl. 2(1) that the works carried out by the respondent was defective. Neither was there any instruction of the architect given under cl. 6(4) for the removal from site of any work, materials or goods which are not in accordance with the contract at all material time prior to the determination of the contract on 24 April 1998.
>
> [10] Applying the legal principles laid down by the Federal Court in *Pembenaan Leow Tuck Chui*'s case, it is our judgment that the appellant have no right to deduct or set off against the sums certified under the interim certificates. The respondent is entitled to payment immediately and as such the debt cannot be disputed and the appellant has no meritorious defence ...

[51] In *Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd* [2009] 1 LNS 1430; [2009] MLJU 1252, the High Court considered Dataran Rentas and concluded that in the latter case the common law and equitable rights of set-off had been modified by the terms of the contract whereby the contractual conditions precedent to the exercise of the right to a set-off were clearly absent, such that the appellant could not, on the facts, assert such a right of set-off. The High Court added thus:

> In short an employer such as the Respondent may only deduct or set off if there are express provisions in the contract for a deduction or set-off and even then limited only to the scope of the permitted deductions or set-offs.
>
> In the instant case Clause 22.1 which provides for Liquidated and Ascertained Damages provides that if the contractor fails to complete the works by the date for completion or within any extended time and the employer deems that the same ought reasonably to have been completed then the contractor, ie, the Petitioner is liable to pay to the Employer LAD for the period from the Date for Completion or any extended date where applicable to the date of Practical Completion. The clause specifically provides that: " ... The Employer may deduct such sum as a debt from any monies due or to become due to the Contractor under this Agreement." **It appears therefore on a perusal of the Agreement as a whole that the parties agreed to allow the Respondent to set-off LAD for the period specified, from monies due to the Petitioner as Contractor** ...
>
> **From a cursory reading of the Agreement between the parties it appears that the Respondent is entitled to set-off any LAD claims it might have against the Petitioner**.

[52] The High Court in *Hasjuara* then concluded, among others, with the findings as follows:

> There is no judgment in this matter as I have stated at the outset. Applying the tests referred to earlier to the facts set out above it is clear to this Court that a genuine dispute does exist as to the 'debt' owed by the Respondent to the Petitioner. It must be emphasised that this is not a case where there has been a simple overstatement of the amount

A claimed (see *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn. Bhd.* [2000] 4 CLJ 437). Nor is it a case where the sum claimed by the Petitioner can be proved or made out on the basis of the documents before the Court. The factual matrix instead discloses that the precise amount claimed by the Petitioner is not fully substantiated and is unclear. Additionally the Respondent appears to have valid and subsisting
B cross-claims for LAD and defective works or unfinished 'remedial works and testing'. In these circumstances I have no hesitation in concluding that a genuine dispute does indeed exist".

[53] It is observed that in *Hasjuara*, like in the instant case, there is no judgment debt. It cannot therefore be readily said that there is no disputed
C debt. Similarly, in both cases, there are clear provisions entitling deductions for LAD given the delay in the completion of the works. In the instant case, the three interim certificates each stated specific amount of LAD entitled to be deducted by the plaintiff. So too there are assertions of cross-claims for defective works which have not been finalised, rendering the amount stated
D in the s. 218 notice less than certain. It is not critical that the cross-claims must have been litigated, for, as made clear by the High Court in *Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd* [2013] 9 CLJ 650; [2014] 11 MLJ 916 (in a decision which examines a number of leading authorities and precedents on the subject), to evaluate a cross claim which
E is genuine and based on substantial grounds at the stage hearing a *Fortuna* injunction application would be to determine the merits of that claim prematurely or to litigate the issue twice.

[54] In the instant case, in my assessment, there is sufficient evidence to support the contention that the plaintiff is reasonably entitled, apart from to
F the LAD for late completion, to seek recovery from the defendant as its sub-contractor in respect of civil claims arising from the damage by construction works done to the neighbouring properties. For example, in a letter from the Architect to HVC dated 10 October 2014 (well before the s. 218 notice of 29 June 2015), the architect updated HVC that the architect, together with
G the project's civil and structural engineers, had concluded that the piling and basement structure works undertaken by the sub-contractor were responsible for causing cracks to the shop-lot belonging to Wagner Piano. The cross-claim can thus be construed as genuine and based on substantial grounds.

[55] It has not escaped my attention that there are two fundamental points
H which distinguish the instant case from *Dataran Rentas* and *Hasjuara*. In *Dataran Rentas* and *Hasjuara*, the dispute was between the employer and the main contractor. Thus unlike in the instant case, those suits were between contracting parties. There was no question on the pivotal issue of the absence of a contractual nexus. As I mentioned earlier, this issue alone justified the
I granting of the injunction against the defendant in the instant case.

[56] The second point of distinction is that both *Dataran Rentas* and *Hasjuara* involved the stage of the hearing of a winding up petition itself. Although the formulation of the critical question of whether a debt claimed

under the winding up notice is *bona fide* disputed on substantial grounds is in essence the same in a *Fortuna* injunction application (to decide whether to grant an injunction to stop the petition) or as in hearing the petition proper (to decide whether to grant the winding up order), the decisions in these two cases therefore did not strictly consider the situation in the context of a step earlier in time, namely an application for a *Fortuna* injunction to prevent the petition from being presented. Indeed there are authorities which held that matters such as cross-claims should rightfully only be considered during the hearing of the petition itself, and not appropriate to be relied on as a basis to stall the presentation of the petition by way of a *Fortuna* injunction.

[57] In *Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705, a case not referred to by the parties before me, the Court of Appeal decided on the following key findings, as expressed in the judgment of Sulaiman Daud JCA:

> (1) The statutory notice which was presented to the plaintiff was based on a final judgment and the application for stay of execution was dismissed. Moreover, there existed a judgment debt which was supposed to be paid by the plaintiff to the first defendant. The existence of any counter claim which was in dispute and yet to be decided could not be accepted as an excuse for the plaintiff's refusal to comply with the said statutory claim.
>
> (2) The case of *Pontian United Theatre Sdn Bhd v. Southern Finance Berhad* which was referred by the plaintiff's counsel had not directed a legal proposition that the existence of a counter claim or cross claim could be made as an excuse to restrain a particular creditor from presenting a winding up petition. In that case, the winding up petition had already been filed and one of the issue before the court was whether the existence of a counter claim for the sum exceeding the amount claimed through a winding up petition could be used as a basis to dismiss the said petition. It had no connection with an application to restrain the presentation of a petition.
>
> (3) A petition to wind up a company based on a valid judgment was not an abuse of court process. Though there was evidence to show that the plaintiff had issued the judgment debt sum to its solicitors, it did not remove the plaintiff from the definition of 'persons unable to pay its debts' under s. 218(2)(a) of the Act. The amount owed was more than RM500 and the plaintiff neglected to pay the judgment debt which was claimed within the time fixed under the said section. **Besides, the issue in relation to solvency of a debtor was not supposed to be weighed at the stage of an injunction application** (*Mann and Another v. Goldstein and Another*; refd).
>
> (4) The honourable judge had overlooked that the plaintiff had not satisfied the first defendant's statutory claim which was based on a valid judgement whereby the execution of it was not stayed. The said petition was for a valid reason to insist on payment of a valid judgment debt and was not for other collateral reasons. **It was appropriate to decide on the**

A **issue of the plaintiff's solvency in the winding up proceeding itself because it was a defence which could be used in such a proceeding**. Furthermore, there was nothing in the plaintiff's affidavit which showed that it would incur any loss which was difficult to be restored if the first defendant was allowed to proceed with the winding up petition.?

B (emphasis added)

[58] The assertion of the existence of cross-claims was not accepted in *Zalam Corporation*, but importantly, in that case, the defendant already had secured a judgment debt, which formed the basis of its winding up notice. In the instant case, like in *Hasjuara*, there is no judgment debt. It is also C worthy of mention that in *Josu Engineering*, the cross-claim even defeated the statutory right of a judgment creditor to present a petition, but it must be appreciated that in that case, the cross-claim itself was in the nature of an interlocutory judgment. It is apposite that I now set out a passage from the judgment of Mary Lim J (as she then was) in *Josu Engineering* which D highlights the key and relevant conclusion:

> [49] From the above cases, it can first of all be said that where a debt is undisputed, an injunction to restrain the presentation of a petition to wind up a company upon failure to pay upon the debt demanded is generally refused. The arguments challenging the issuance of the s. 218 notice should also be made in the winding up court. Otherwise, the only E viable option is to pay up. Secondly, where a debt is undisputed, an injunction may nevertheless be ordered where a genuine cross-claim based on substantial grounds is raised. In such a case, the courts recognise that the presentation of such a petition might produce irreparable damage to business and reputation. Thirdly, the burden of proof in both instance of disputed debt and undisputed debt is whether there is a likelihood that F the petition to wind up may fail or that it is unlikely that a winding up order would be made; as opposed to a test that the petition is bound to fail.

[59] Thus, an allegation of the existence of a cross-claim may be raised before the hearing of the petition, but earlier at the injunction stage, and may G even succeed if shown to be genuine and based on substantial grounds, despite the debt owed to a defendant being undisputed, such as when it is in accordance with a judgment debt. Here in the instant case, as said more than once earlier, there is no judgment debt, and the debt claimed by the defendant's s. 218 notice is thus disputed. It was further held by the High H Court that the injunction was also allowed to prevent irreparable damage to the plaintiff in that case. However, as referred to earlier in this judgment, in *Pacific & Orient Insurance*, the Court of Appeal was clear in stating that the question of whether there was irreparable damage was wholly irrelevant when there is a judgment debt, as a petition would thus be bound to fail. Any I fears of damage should be avoided by settling the judgment debt (see the Court of Appeal decision in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus*

Sdn Bhd [2002] 3 CLJ 380). In any event, again, in the instant case, there is no judgment debt. As such, there is stronger basis to consider the cross-claim at this stage.

[60] I am also satisfied that the plaintiff in the instant case has shown that it and the project will suffer irreparable harm if the injunction is not granted, especially considering the implications of a winding up petition on the ongoing Residensi Tribeca Project, including in respect of any such petition constituting an event of default under the relevant financing arrangements binding the plaintiff in the facilities agreement with HSBC Bank Malaysia Berhad dated 10 December 2014, more so since it was averred on behalf of the plaintiff that there were already 164 confirmed end-purchases in respect of whom 73 purchasers had obtained end financing for the acquisition of the units.

[61] Furthermore, it is also observed that the financial solvency of the plaintiff does not appear to be an issue and in any event not challenged by the defendant. Its financial statements for the year ended 31 December 2014, as exhibited to the affidavit in support, disclosed cash and cash equivalent balances in the amount of RM23,807,634. On this, it will be recalled that it was held by the Court Appeal in *Zalam Corporation* as highlighted in the passages reproduced earlier in this judgment, that the issue on the solvency of the plaintiff who seeks a *Fortuna* injunction is irrelevant at the injunction application stage, and the same ought to be adjudicated on at the hearing of the petition. However, in *Tan Kok Tong*, Gopal Sri Ram JCA, said this:

> In *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, Low Hop Bing J (as he then was) correctly held as follows (at p. 321):
>
> > In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:
> >
> > > I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of 'serious question to be tried' in *American Cynamid Co v. Ethicon. Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.

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> Illustration of a *prima facie* case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.

[62] In yet another Court of Appeal decision involving an application for *Fortuna* injunction, *Tan Kok Tong* was referred to, and the issue of
B commercial solvency was taken into consideration. Suriyadi JCA (as he then was) concluded the findings of the majority decision of the Court of Appeal in *Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd* [2010] 2 CLJ 541; [2010] 3 MLJ 459 as follows:

> [40] From the totality of the evidence there was clearly a genuine dispute
C as to the debts in question as explained above, **let alone the insolvency of the respondent was never established adequately**. I was thus satisfied that the learned judge had exercised his discretion correctly in granting the order, not only for the *ex parte*, but also the *inter partes* applications. As said above, an appellate court will rarely interfere with an exercise of
D discretion unless the trial judge has erred in law or if the trial judge has failed to take into account highly relevant considerations. Here I failed to detect that error.

[63] In my view, commercial solvency, whilst clearly a critical issue to be determined by the courts when assessing whether or not a winding up order ought to be granted on the basis of a notice issued under s. 218(1)(e) of the
E Companies Act 1965 (concerning the company being unable to pay its debts) should also be a consideration at the injunction application stage, but cannot without more defeat the position of an undisputed debt, especially a judgment debt.

F **[64]** Otherwise, an unsatisfactory, and almost dysfunctional scenario may present itself, should the excuse of the solvency of a judgment debtor be accepted as of right to be a basis justifying the grant of an injunction preventing a judgment creditor from exercising its statutory right to present a winding up petition against the judgment debtor for the debtor's failure to
G pay on the winding up notice. I would think it correct in principle that as a general rule, a debtor cannot legitimately hide behind the shield of solvency to stave off threat of winding up but at the same time conveniently refuse settlement of an undisputed debt.

[65] It is also of significance to make mention of the High Court case of
H *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653 where Abdul Malik Ishak J (as he then was) allowed an injunction to restrain the presentation of a winding up petition, having determined the debt to be *bona fide* disputed in that case. Reference was made of the leading English High Court authority of *Re Lympne Investments Ltd* [1972] 2 All ER 385 which had famously held the following:

I

> That Companies Court must not be used as a debt-collecting agency, not as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against

> it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

[66] In my view, considering the nature and context of the claims between the parties in the instant case, there is nothing preventing the defendant from pursuing what is probably a more efficient dispute resolution mechanism, by making an adjudication claim pursuant to the Construction and Industry Payment and Adjudication Act 2012 ("CIPAA"). This could be the more suitable alternative procedure for the defendant to assert its claim, instead of inflicting upon the plaintiff undue pressure *via* a winding up notice through the medium of the winding up court that could occasion irreparable damage to an otherwise commercially solvent company. At its core, there is no judgment debt in the instant case, and it is not out of place for me to refer to the New Zealand case of *Re Prime Link Removals Ltd* [1987] 1 NZLR 510 which considered s. 218 (a) of the New Zealand Companies Act 1955 which is *in pari materia* with s. 218(2) of the Malaysian Companies Act 1965, and held instructively as follows:

> A claim against a company for damages for breach of contract, not converted to a judgment debt but still wholly prospective and contingent, is not a sum then due by which the company is indebted in terms of section 218(a) of the Act. Failure to met a demand for such a claim is not a neglect to pay the sum in terms of section 218 (a) ...

[67] Further, in the case of *Seawealth Nautical Sdn Bhd v. Kekal Kaya Marin Sdn Bhd* [2011] 9 CLJ 577 the High Court emphasised that although a judgment debt is not a pre-requisite, to proceed with a winding up petition on a non-judgment debt requires more than a mechanical adherence to the statutory provision of s. 218(2)(a) notice. If the debt is *bona fide* disputed on substantial grounds, and if, in certain cases a petition if presented will be bound to fail, the courts can, and should, restrain the creditor from presenting a winding-up petition, and if presented, to restrain further proceedings on it, to prevent abuse of the court's process.

[68] I do not agree that the plaintiff's claim is an afterthought intended to stifle a genuine statutory right. In the first place, the absence of a contractual relationship means the defendant's claim of debt owing to it from the plaintiff must necessarily fail. If that is not sufficient, it is clear that the said debt is *bona fide* disputed on substantial grounds, considering there is no judgment debt and taking into account the assertions of right of set-off and the existence of cross-claims. A petition, if one be presented on the strength of the s. 218 notice in the instant case, is thus bound to fail. This is the classic formulation of the first principle or ground entitling the grant of *Fortuna* injunction, as made clear by cases such as *Pacific & Orient Insurance.*

[69] Further, the defendant's pursuit of the s. 218 notice may also be construed as falling within the second principle of *Fortuna* injunction given the defendant's choice of instituting the winding up process as it has, and in the process risking irreparable damage to the otherwise solvent plaintiff, instead of invoking the more suitably structured resolution mechanism under CIPAA. In short, in all situations, in the instant case, allowing a winding up petition be presented would be an abuse of process that the court will not countenance.

Conclusion

[70] On the basis of the foregoing analysis and reasons, it is my judgment that the plaintiff has successfully established its case for the grant of a *Fortuna* injunction to restrain the presentation of a winding up petition by the defendant against the plaintiff. I therefore allow encl. 7 with costs.